No. 11,872

IN THE

United States
CIRCUIT COURT OF APPEALS
For The Ninth Circuit

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PERREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

PART I.

RELATIONSHIP OF THE WIRTZ APPEAL TO THE INSTANT APPEAL[1]

During 1946 various locals of the ILWU were the certified bargaining agents for employees of

[1]References herein to the "*Wirtz* case" and the "*Wirtz* appeal" are to the proceedings commenced by Writ of

practically all of the sugar plantations operating in the Territory of Hawaii.

A strike of employees of such plantations was in effect from September 1, 1946 until November 19, 1946. At some of the plantations the strike brought in its wake coercion and intimidation of nonstriking employees by pickets, mass picketing to obstruct ingress and egress, and other excesses.

On October 17, 1946 Maui Agricultural Company, Limited, one of the plantations, brought a suit for injunction against the ILWU, the appropriate local, and others. The suit was brought in the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii. On the same day Cable A. Wirtz, as Judge of said Circuit Court, issued in the suit a temporary restraining order, hereinafter referred to as the Wirtz order, which restricted and regulated picketing of Maui Agricultural Company, Limited (*Wirtz* Tr. pp. 36-42). The Wirtz order was issued without complying with the procedural provisions of Sections 7, 8 and 9 of the Norris-LaGuardia Act (29 U.S.C. 107, 108, 109).

Prohibition in the Supreme Court of the Territory of Hawaii entitled *I.L.W.U., et al.,* Petitioners, vs. *Wirtz, et al.,* Respondents, No. 2637, reported at 37 H. 404, petition for rehearing denied 37 H. 445, on appeal, No. 11,568 in the Circuit Court of Appeals for the Ninth Circuit.

References herein to the "instant case" and the "instant appeal" are to the suit for injunction brought by the appellants herein in the United States District Court for the District of Hawaii, entitled *Constancio R. Alcsna, et al.,* Plaintiffs, vs. *Rice, et al.,* Dependants, Civil No. 769, reported in 69 F. Supp. 897 and 74 F. Supp. 865, on appeal, No. 11,872 in the Circuit Court of Appeals for the Ninth Circuit.

At the time of writing this brief, the Circuit Court of Appeals has not handed down its decision in the *Wirtz* appeal.

On November 9, 1946 the *Wirtz* case was commenced by the filing in the Supreme Court of the Territory of Hawaii of a petition for Writ of Prohibition (*Wirtz* Tr. pp. 15-21). The purpose of the *Wirtz* case was to obtain a prohibition against further proceedings in the above mentioned suit in said Circuit Court. The petitioners in the *Wirtz* case were the defendants named in said suit, and the respondents in the *Wirtz* case were Judge Wirtz and Maui Agricultural Company, Limited.

The theory of the petition in the *Wirtz* case was that the Circuit Court of the Second Judicial Circuit is a "court of the United States", within the meaning of that term as defined in Section 13(d) of the Norris-LaGuardia Act (29 U.S.C. 113(d)), and therefore that Judge Wirtz did not have jurisdiction to issue the Wirtz order without complying with the procedural provisions of Sections 7, 8 and 9 of the Norris-LaGuardia Act. The petitioners in the *Wirtz* case relied on such procedural provisions,—as is shown by the list, set forth in the Petition for Writ of Prohibition, of the respects in which it was alleged that there was failure to comply with the Norris-LaGuardia Act (*Wirtz* Tr. pp. 19-20).

The joint we particularly wish to make with respect to the *Wirtz* case, and a circumstance in which the *Wirtz* case differed from the instant case, is that in the *Wirtz* case the sole question involved was one of jurisdiction. This was necessarily so with the choice of prohibition as a remedy.

The Supreme Court of the Territory of Hawaii held that a territorial court is not a "court of the United States" and therefore that Judge Wirtz had jurisdiction to issue the Wirtz order (37 H. 404; *Wirtz* Tr. pp. 57-70). The Petition for Writ of Prohibition was dismissed by judgment entered on December 18, 1946 (*Wirtz* Tr. pp. 71-72).

The origin of the instant case is similar to, but not identical with, the origin of the *Wirtz* case. On September 16, 1946 The Lihue Plantation Company, Limited, another of the plantations, brought a suit for injunction against the ILWU, the appropriate local, and others. The suit was brought in the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii. On September 23, 1946 Philip L. Rice, as Judge of said Circuit Court, issued in the suit an amended temporary restraining order, hereinafter referred to as the Rice order, which restricted and regulated picketing of The Lihue Plantation Company, Limited (Tr. pp. 198-203). The Rice order was issued without compliance with the procedural provisions of the Norris-LaGuardia Act.

On October 29, 1946 Alesna, et al. were indicted for contempt for violating the Rice order (Tr. pp. 32-40). Subsequent to the commencement of the instant case, and pursuant to stipulation entered in the instant case and approved by Judge McLaughlin, an information for summary contempt was substituted for the indictment (Tr. pp. 355-370).

On January 31, 1947 the instant case was commenced by the filing in the United States District Court for the District of Hawaii of a Complaint for Injunction (Tr. pp. 5-46). The purpose of the instant case was to obtain an injunction restraining all further proceedings pursuant to the indictment above referred to. The plaintiffs in the instant case were the persons who had been indicted, i.e., Alesna, et al., and the defendants in the instant case were Judge Rice and the Attorney General of the Territory of Hawaii.

The District Judge held against the plaintiffs in the instant case. See *Alesna* vs. *Rice* (1947), 74 F. Supp. 865 (Tr. pp. 314-340). The Complaint in the instant case was dismissed by Judgment and Decree

entered on December 22, 1947 (Tr. pp. 343-344).

The appellants in the instant case and the appellants in the *Wirtz* case both raise the jurisdictional question of whether a circuit court of the Territory of Hawaii is a "court of the United States", within the meaning of that term as defined in Section 13(d) of the Norris-LaGuardia Act, and whether a circuit court of the Territory of Hawaii can issue an injunction or restraining order in a labor dispute case without complying with the procedural requirements of the Norris-LaGuardia Act (Tr. pp. 5-12—first count in instant case Complaint—, and p. 380—par. (1)—; Op. Br. pp. 8-9—par. 1—, p. 15—par. 2—, and p. 27 et seq.; *Wirtz* Tr. p. 6—Assignment No. 4 and Assignment No. 5—; *Wirtz* Op. Br. p. 7, p. 16 et seq.). The foregoing jurisdictional question was the principal issue in the *Wirtz* appeal. No argument will be included in this brief with respect to the issue.

The appellants in the instant case and the appellants in the *Wirtz* case also both urge, as an alternative to their position that a circuit court of the Territory of Hawaii is a "court of the United States", that an effect of the Norris-LaGuardia Act is to confer exclusive jurisdiction to issue injunctions and restraining orders in Hawaii in labor dispute cases on the United States District Court for the District of Hawaii (Tr. pp. 12-13—second count in instant case Complaint—, and p. 380—par. (i)—; Op. Br. p. 9—par. 2—, p. 15—par. 3—, and p. 31 et seq.; *Wirtz* Op. Br. pp. 88-90). No argument will be included in this brief with respect to this contention.

The appellants in the instant appeal and the appellants in the *Wirtz* appeal both urge that the restraining orders involved in their respective appeals were in violation of substantive rights claimed by them under Section 20 of the Clayton Act (29 U.S.C.

52) and Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) (Tr. pp. 13-14—third count in instant case Complaint—, and p. 380—par. (j)—; Op. Br. p. 9—par. 3—, p. 15—par. 4—, and p. 32 et seq.; *Wirtz* Op. Br. pp. 74-82, and related matter pp. 55-74 and 82-88).

However, in the *Wirtz* appeal, the issue of substantive rights is an issue of jurisdiction only—it having been raised on appeal from proceedings commenced by a Petition for Writ of Prohibition. In the *Wirtz* appeal the issue is whether Judge Wirtz had *jurisdiction* to impose certain specified restraints upon picketing. The question of *jurisdiction* in turn depends upon whether the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii is a "court of the United States". Furthermore, if said Circuit Court is a "court of the United States", then the appellants in the *Wirtz* appeal must prevail, irrespective of the issue of substantive rights. It follows that a determination of the issue of substantive rights is not necessary to the disposition of the *Wirtz* appeal.

On the other hand, in the instant appeal, the issue of substantive rights arises independently of any question of jurisdiction. For the foregoing reason this brief will include, in Part IV, argument with respect to the issue of substantive rights.[1]

The instant appeal also involves the issue of

[1]To a large extent the argument in this brief on the issue of substantive rights uses the same thoughts and language as were used in the Answering Brief of Maui Agricultural Company, Limited in the *Wirtz* case. In part this matter was first used by us in briefs filed in the instant case in the District Court and was used by counsel for Maui Agricultural Company, Limited with our consent. In part this matter was first used by counsel for Maui Agricultural Company, Limited in said Answering Brief and is used by us with his consent.

whether the Rice order was in violation of the constitutional right of freedom of speech and the constitutional right peaceably to assemble (Tr. pp. 14-20—fourth count in instant case Complaint—, and p. 380—par. (k)—; Op. Br. p. 9—par. 4—, p. 15—par. 5—, and p. 42 et seq.). The constitutional issue was not involved in the *Wirtz* appeal. This brief will include, in Part III, argument with respect to the constitutional issue.

There is also involved in the instant appeal various questions having to do with the relationships between the United States District Court for the District of Hawaii and the courts of the Territory of Hawaii. This brief will include, in Part V, our position with respect to these matters.

In the instant appeal the appellants have raised questions with respect to procedural problems which arose in connection with various motions made in the District Court (Tr. p. 379—par. (f)—and par. (g)—; Op. Br. pp. 12-13, p. 15—par. 1—, and pp. 16-26). As will be shown more fully *infra* it is our position that the complaint in the instant case does not state any claim for relief and that therefore the action of Judge McLaughlin in dismissing the complaint was correct and should be sustained, irrespective of any procedural intricacies involved in the proceedings in the District Court.

PART II

SUMMARY OF ARGUMENT[1]

A. The Constitutional Issue (pages 11 to 36)

The United States Constitution protects the right of freedom of speech and the right peaceably to assemble.

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[1]Reference is made to the Table of Contents for data with respect to page locations of details of argument.

The foregoing constitutional guarantees do not prohibit an injunction or restraining order from regulating picketing or even from prohibiting picketing altogether under appropriate factual circumstances. An injunction or restraining order which regulates picketing may be adjusted to the particular factual situation in accordance with the well settled practice of equity.

The Rice order prohibited obstruction (by mass picketing or otherwise), intimidation, coercion and offensive and disorderly conduct. In addition paragraph (7) of the Rice order prohibited mass picketing and congregating in crowds to interfere with ingress and egress. The Rice order also limited to three the number of pickets at points of ingress and egress and provided that pickets in excess of three at any other point should be in motion and should maintain a distance of not less than three feet except when passing. The appellants face prosecution for violating the provisions of the Rice order referred to in the two foregoing sentences of this paragraph.

The Rice order did not interfere with the constitutional right of freedom of speech or with the constitutional right peaceably to assemble.

Numerous cases hold that the constitutional guarantees do not give the right to engage in mass picketing to obstruct ingress or egress and hold further that, notwithstanding the constitutional guarantees, injunctions or restraining orders may prohibit mass picketing to obstruct ingress or egress and may limit the number of pickets.

There is no basis for various objections made by the appellants to the Rice order,—such objections relating to mass picketing, limitations of numbers, the fact that the Rice order was issued *ex parte*, the numbers of persons restrained, the geographical extent of the

restraints, and the use of alleged vague and indeterminate language.

The invalidity of any portion of the Rice order would not affect the validity of the remainder.

The contention by the appellants that the Rice order was unconstitutional on its face is untenable. An injunction or restraining order which regulates picketing may be adjusted to a particular factual situation. It necessarily follows that such an injunction or restraining order cannot be held to be invalid on its face.

B. The Issue of Substantive Rights (pages 36 to 58).

The last clause of the second paragraph of Section 20 of the Clayton Act provides that none of the specified acts listed in said second paragraph shall be considered or held to be in violation of any law of the United States. The last clause is the basis of substantive rights under Section 20. The purpose of the last clause was primarily to amend the substantive aspects of the Sherman Act and secondarily to amend the substantive aspects of any other federal legislation which might be interpreted to prohibit any of the specified acts. There was no purpose to amend local law, state or territorial, on matters relating to the maintenance of peace and order, and having no relation to the antitrust laws or any such other federal legislation.

The specified acts listed in Section 4 of the Norris-LaGuardia Act are in *pari materia* with the specified acts listed in Section 20 of the Clayton Act.

The specified acts listed in Section 20 and in Section 4 modify the impact in the Territory of Hawaii of the Sherman Act (and of any other federal legislation which may be pertinent) but do not state the substantive law of the Territory. The fact that the

specified acts are declared to be not in violation of any federal legislation does not mean that they are not or can not be in violation of local territorial law.

The term "law of the United States", as used in Section 20 has a well defined meaning which does not include the law of a territory.

A limitation upon the normal police powers of a territory is not to be implied.

Assuming that the substantive aspects of Section 20 and Section 4 affect the local law of the Territory of Hawaii, nevertheless the Rice order did not deprive the appellants of substantive rights under said sections. The substantive rights relied on by the appellants relate to "giving publicity" and "assembling peaceably". These are no broader than the constitutional right of freedom of speech and the constitutional right peaceably to assemble. Therefore such regulations of picketing which are permitted notwithstanding the constitutional rights are also permitted notwithstanding the substantive rights. It follows that the Rice order was not inconsistent with the substantive rights.

C. The Relationship Between the District Court and the Courts of the Territory of Hawaii (pages 59 to 69).

Under the Hawaiian Organic Act the courts of the Territory of Hawaii are in a relatively similar position to the federal judicial system as are the courts of the United States. If a constitutional district court is precluded by statute or rule of law from interfering with state court proceedings similar to the proceedings in which the Rice order was issued, the District Court for the Territory of Hawaii is likewise precluded from interfering with the territorial court proceedings.

Interference by a constitutional district court in

similar state court proceedings is prohibited by Section 265 of the Judicial Code. Actions under the Civil Rights Act do not constitute an exception to Section 265.

Interference by a constitutional district court in similar state court proceedings would not be justified, even in the absence of Section 265. The appellants do not face any injury other than that incidental to any criminal prosecution brought lawfully and in good faith. The constitutionality of the Rice order may be determined as readily in the contempt proceedings pending against the appellants (including appellate proceedings with respect thereto) as in the instant case brought by them (including appellate proceedings with respect thereto).

The judges of the circuit courts of the Territory are best qualified to determine the provisions to be incorporated in injunctions or restraining orders regulating picketing. There is no practical reason why the District Court for the District of Hawaii should supervise labor injunction proceedings in the territorial courts.

D. Conclusion: The Complaint in the Instant Case was Properly Dismissed (pages 69 to 71).

The complaint in the instant case does not state any claim for relief. The dismissal of the action should be affirmed.

PART III

THE AMENDED TEMPORARY RESTRAINING ORDER WAS NOT IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANTS OR ANY OF THEM OF FREEDOM OF SPEECH AND PEACEABLY TO ASSEMBLE

A. Introduction.

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, * * *."

The government of the Territory of Hawaii and its various branches exist and act pursuant to authority granted by congress. The Territory of Hawaii is an incorporated territory of the United States. It may be assumed therefore that the limitations on Congressional action imposed by the First Amendment operate also as limitations on action by the territorial government and its various branches. Compare *Farrington* vs. *Tokushige* (1927), 273 U.S. 284 47 S. Ct. 406, in which it was held that the Fifth Amendment operates to limit action by the territorial legislature and officers.

The First Amendment by its language operates only as limitations on Congressional action. However, a long line of authorities establish that the freedoms guaranteed against federal encroachment by the First Amendment, including freedom of speech and the right peaceably to assemble, are protected by the provisions of Section 1 of the Fourteenth Amendment against abridgments by the states. See *Hague* vs. *C.I.O.* (1939), 307 U. S. 496, 59 S. Ct. 954, and *Thornhill* vs. *Alabama* (1940), 310 U.S. 88, 95, 60 S. Ct. 736, 740. It follows that decisions relating to the scope of the constitutional right of freedom of speech and the scope of the constitutional right peaceably to assemble are equally applicable whether they have been rendered in connection with action by the federal government or action by a territorial government or action by a state government.

Those of the appellants who are citizens of the United States contend that the Rice order was in violation of their rights under the First Amendment in that it constituted an abridgement of "freedom

of speech" and of the right "peaceably to assemble" (Tr. pp. 14-20; Op. Br. pp. 42-47). It appears desirable therefore to set forth here an analysis of the Rice order.

B. Analysis of Amended Temporary Restraining Order.

The Rice order prohibited the ILWU, Local 149 of the ILWU, Unit 1 of Local 149, and individuals, from taking certain specified actions listed in seven numbered paragraphs (Tr. pp. 200-202). The Rice order also, following paragraph numbered (7), provided for limitations on the numbers of pickets by providing that there should be not more than three pickets in a group at any point of ingress to and egress from the real property of The Lihue Plantation Company, Limited, and that pickets in excess of three at any other point should be in motion and should maintain a distance of not less than ten feet except when passing (Tr. pp. 202-203).

In the first count of the information against the appellants they are charged with violating paragraph (7) in that they engaged in mass picketing to obstruct ingress and egress (Tr. pp. 358-361). In the second count of the information against the appellants they are charged with violating the limitations on the numbers of pickets in that they picketed in groups of more than three at points of ingress and egress (Tr. pp. 361-364).

It appears therefore that paragraphs (1) to (6) of the Rice order are not involved in the instant appeal. Furthermore the Appellants' Opening Brief does not contain any contentions with respect to such paragraphs. We will therefore not discuss such paragraphs, other than to state in general that they prohibited obstruction (by mass picketing or otherwise), intimidation, coercion, and offensive and disorderly conduct.

Paragraph (7) dealt with mass picketing and congregating in crowds on or near the real property of The Lihue Plantation Company, Limited. Paragraph (7) did not prohibit mass picketing and congregating in crowds generally, but prohibited the same only if employed for a specified purpose, i.e.:

> "to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egree from said real property * * *".

Paragraph (7) did not restrict freedom of speech. Also it did not restrict the right peaceably to assemble. Notwithstanding the provisions of paragraph (7) the appellants and all other persons were left free to exercise their constitutional right of freedom of speech and also to exercise their constitutional right peaceably to assemble. Under paragraph (7) they were merely prohibited from massing or congregating for the purpose of obstructing ingress or egress. Paragraph (7) did not prohibit assembling for other purposes.

Presumably the provision imposing limitations on numbers was included in the Rice order because Judge Rice came to the conclusion that mass picketing to obstruct ingress or egress could not effectively be eliminated unless the numbers of pickets were limited.

The provision imposing limitations on numbers did not interfere with freedom of speech. It permitted ample opportunity to advertise the facts of the labor dispute. The provision did not eliminate picketing at any place or places whatsoever. The provision merely limited to three the number of pickets at points of ingress and egress and provided that pickets in excess of three at any other point should act in accordance with specified standards of reasonable conduct. The provision did not impose any limitation in the aggregate number of pickets.

Furthermore the provision imposing limitations on numbers did not interfere with the right peaceably to assemble. It regulated picketing only. Assembling other than in connection with picketing was not affected.

C. Constitutional Basis of Picketing.

Prior to 1937 the right to picket was thought of as a part of the right to strike and was limited to peaceful picketing in connection with a lawful strike. See *Teller, Picketing and Frec Speech,* 56 Harvard Law Review, 180.

In *Senn* vs. *Tile Layers Union* (1937), 301 U.S. 468, 478, 57 S. Ct. 857, 862, the Supreme Court announced in in a dictum as follows:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

The foregoing dictum is the starting point for the present constitutional basis for picketing.

The next decisions of the United States Supreme Court on the subject of picketing were in the comparison cases of *Thornhill* vs. *Alabama* (1940), 310 U.S. 88, 60 S. Ct. 736, and *Carlson* vs. *California* (1940), 310 U.S. 106, 60 S. Ct. 746.

The *Thornhill* case involved the validity of an Alabama statute directed against picketing. The statute prohibited the picketing of a place of lawful business for the purpose of impeding, interfering with, or injuring such business. As construed by the Alabama courts the statute forbade the publicizing of facts concerning a labor dispute, whether by printed sign, by pamphlet, by word of mouth, or otherwise, in the vicinity of the business involved, without regard to the number of persons engaged in the activity and without regard to the peaceable

character of their conduct. The Supreme Court held that the statute was in violation of the Federal Constitution and particularly the guarantees against freedom of speech and of discussion. The statute was invalid because it prohibited all picketing, peaceful or otherwise. This is made clear by the language in the opinion (310 U.S. 88, 105, 60 S. Ct. 736, 746) as follows:

> "We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

The *Carlson* case involved the validity of an ordinance of Shasta County, California. The ordinance made it unlawful for any person to carry or display any sign, banner or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there or for any person to loiter or picket in the vicinity of any place of business for such purpose. The Supreme Court held the ordinance to be unconstitutional, on the authority of the *Thornhill* case.

The next decision of the Supreme Court on the subject of picketing was in *Drivers Union* vs. *Meadowmoor Co.* (1941), 312 U.S. 287, 61 S. Ct. 552, affirming a decision of the Illinois Supreme Court, 371 Ill. 377, 21 N.E. 2d. 308. The case arose out of the suit of Meadowmoor Dairies, Incorporated, a distributor of milk, to enjoin the Milk Wagon Drivers' Union of Chicago, its members, and others, from picketing

stores where milk distributed by Meadowmoor Dairies, Incorporated was sold. The suit was brought in equity in the Superior Court of Cook County, Illinois. A preliminary injunction was issued which imposed an absolute prohibition against picketing. Hearings were then held before a master, who recommended that a permanent injunction be issued prohibiting all picketing. The trial court, however, accepted the recommendations of the master only as to acts of violence, and issued an injunction which permitted peaceful picketing. The Supreme Court of Illinois reversed the action of the trial court and ordered that the injunction prohibit all picketing. The action of the Supreme Court of Illinois was affirmed by the United States Supreme Court. The approval by the Supreme Court of an injunction prohibiting all picketing was based on the findings of the master, approved by the Illinois Supreme Court, to the effect that the picketing had involved flagrant violence.

The *Drivers Union* case involved the issuance of a specific injunction by an equity court in accordance with the general chancery jurisdiction of the equity court[1]. In this respect the *Drivers Union* case was different from the *Thornhill* and *Carlson* cases, which had involved convictions for violations of an anti-picketing statute and an anti-picketing ordinance.

The distinction between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand, and the possibility of fitting a specific injunction or restraining order to

[1]The case did involve the question of whether an Illinois Anti-Injunction Act limited the power of the equity court. The Illinois Supreme Court held that the Act did not apply. The result was that the equity court was empowered to act in accordance with its general chancery jurisdiction.

the facts, in accordance with the settled practice of equity, are stated in the opinion in the *Drivers Union* case in the following language (312 U.S. 287, 292-293, 297, and 298, 61 S. Ct. 552, 554-557):

> "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.
>
> * * *
>
> "We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut,* 310 U. S. 296; *American Federation of Labor* v. *Swing,* post p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama, supra,* so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.
>
> * * *
>
> "The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The in-

junction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist,* 255 N. Y. 307; 174 N. E. 690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

When the appellants in the instant appeal were before the District Court they relied on the reference in the *Thornhill* opinion to "a statute narrowly drawn to cover the precise situation giving rise to the danger." This language was used in the *Thornhill* opinion to indicate that although the statute in that case, which prohibited all picketing, was unconstitutional, a state statute narrowly drawn to cover a precise danger, such as mass picketing, would be constitutional.

Appellants argued that the Rice order was not narrowly drawn and was therefore unconstitutional under the ruling of the *Thornhill* case. In this respect the appellants failed to recognize the distinction, pointed out in the *Drivers Union* opinion, between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand. (In this connection the following might be mentioned: Mr. Justice Black dissented in the *Drivers Union* case. In his dissenting opinion (112 U.S. 299, 308-309, 61 S. Ct. 558, 562-563), he pointed out that an Illinois statute which prohibited all picketing would have been held invalid under the rule of the *Thornhill* case, and he argued from this fact that the injunction itself should have been held invalid under the same rule. In other words, he contended that

there should not be any distinction between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand. However his position was not accepted by the majority of the Court.)

The *Drivers Union* case establishes that the First Amendment does not protect all picketing and does not prevent governmental agencies from prohibiting unlawful picketing. The doctrine of the *Drivers Union* case is that a specific injunction or restraining order may be adjusted to a particular situation in accordance with the settled practice of equity. The *Drivers Union* case holds further that where picketing has involved flagrant violence, a specific injunction or restraining order may impose an absolute prohibition against picketing.

Many controversies require that there be regulations of picketing, in order to convert unlawful picketing into peaceful picketing, but do not require the drastic remedy of eliminating all picketing. For example, if the facts of a controversy as found by an equity judge indicate that mass picketing has been used as a means of obstructing ingress and egress, but indicate further that the elimination of all picketing would not be justified, the situation can be met by prohibiting mass picketing for the purpose of obstructing ingress and egress and by limiting the numbers of pickets. Cases dealing with situations wherein equity judges have regulated picketing, without imposing absolute prohibitions, are referred to subsequently in this brief in Part III D.

Subsequent decisions of the Supreme Court dealing with the subject of picketing are *A. F. of L.* vs. *Swing* (1941), 312 U.S. 321, 61 S. Ct. 568; *Bakery & Pastry Drivers* vs. *Wohl* (1941), 313 U.S. 548, 61 S. Ct. 1108; *Hotel Employees' Local* vs. *Board* (1942), 315

U.S. 437, 62 S. Ct. 706; *Carpenters Union* vs. *Ritter's Cafe* (1942), 315 U.S. 722, 62 S. Ct. 807; *Allen-Bradley Local* vs. *Board* (1942), 315 U.S. 740, 62 S. Ct. 820; and *Cafeteria Union* vs. *Angelos* (1943), 320 U.S. 293, 64 S. Ct. 126. For the most part the cases above listed are not significant to the issues in the instant appeal.

In both the *Drivers Union* case and in the *Carpenters Union* case the Supreme Court upheld injunctions against picketing. In both of these cases Mr. Justice Reed dissented,—thus indicating that he is more solicitous of the right to picket than are the majority of his brethren of the Supreme Court. Nevertheless in his dissent he recognized that the constitutional right of freedom of speech and the constitutional right peaceably to assemble do not protect mass picketing to obstruct ingress and egress and do not prevent the imposition of reasonable restrictions on picketing including restrictions on the numbers of pickets. In his dissenting opinion in the *Drivers Union* case he stated (312 U. S. 317, 318-319, 61 S. Ct. 566, 567):

> "Where nothing further appears, it is agreed that peaceful picketing, since it is an exercise of freedom of speech, may not be prohibited by injunction or by statute. *Thornhill* v. *Alabama,* 310 U. S. 88; *American Federation of Labor* v. *Swing, Post,* p. 321. It is equally clear that the right to picket is not absolute. It may, if actually necessary, be limited, let us say, to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation. *Thornhill* v. *Alabama, supra,* 105. From the standpoint of the state, industrial controversy may not overstep the bounds of an appeal to reason and sympathy."

In his dissenting opinion in the *Carpenters Union* case he stated (315 U.S. 732, 738-739, 62 S. Ct. 812, 815):

"We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required."

D. Cases Upholding Injunctions Regulating Picketing.

It appears to be clear from the opinions in the *Thornhill* and *Drivers Union* cases that the constitutional guarantees do not prevent local governments, whether state or territorial, through their judicial branches, from imposing reasonable regulations on picketing by injunctions or restraining orders which are adjusted to the factual situations presented.

There are listed below various state court decisions wherein injunctions or restraining orders regulating picketing have been granted or approved. The opinions in most of these state court cases have been handed down subsequent to the establishment by the United States Supreme Court of the constitutional basis for picketing. The state court cases are in accord with the rule of the Supreme Court as evidenced particularly by its opinions in the *Thornhill* and *Drivers Union* cases. The state court cases recognize that peaceful picketing is an exercise of the right of freedom of speech and as such is protected by the Constitution. They recognize that the purpose of peaceful picketing is to permit strikers and others in a labor dispute to make their position known to the public. They recognize on the other hand that if picketing is not confined to pursuasion, but extends to intimidation or interference with the rights of others, then it is not protected by the Constitution. More specifically, and with reference to the issues involved in the instant appeal, they recognize that mass picketing to obstruct ingress or egress is unlawful and may be restrained and in con-

nection therewith that the numbers of pickets may be limited.

There follows a list of state court cases, with certain comments with respect thereto bearing on the issues involved in the instant appeal:

Weyerhaeuser Timber Co. vs. *Everett Dist. Council* (1941), 11 Wash. 2d. 503, 119 P. 2d. 643:—decree which prohibited picketing in any manner other than by maintaining not more than five pickets or persons at or near the main entrances to plaintiff's mills B and C, approved (p. 644[1]): the facts showed that the picketing involved the threat of violence inherent in mass picketing and also some actual threats of violence but this did not justify a prohibition against all picketing (p. 645).

Isolantite vs. *United Elec., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183:—restraining order which limited pickets to ten on the sidewalks or street in front of complainant's plant and which required pickets to be spaced at least ten feet apart approved, subject to clarification to permit pickets elsewhere than in front of complainant's plant (pp. 187-188); such restrictions held not to be in violation of right of free speech (p. 187); the facts showed that mass picketing had been planned to intimidate workers and employers (p. 187); limitations on numbers of pickets and spacing of pickets held reasonable to protect co-relative rights of all persons (p. 187).

Westinghouse Elec. Corp. vs. *United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16:—circular or elliptical line with pickets close together indicates intent to deny right of ingress and egress (p. 20); denial of right of ingress and egress amounts to seizure of property under Pennsylvania Anti-Injunction Act (p. 21); injunction ordered

[1]Where more than one case citation is given, page references are to the citation in the National Reporter System.

against mass picketing to prevent ingress or egress (p. 21); such picketing held not to be protected by constitutional guarantees (p. 21).

United States El. Motors vs. *United E. R. & M. Workers* (1946), 166 P. 2d. 921, Superior Court of California, Los Angeles County:—temporary restraining order had prohibited mass picketing for the purpose of obstructing ingress or egress and had limited the number of pickets to four at each of six entrances and had required that they be spaced ten feet apart except when passing (p. 922); order had subsequently been modified to eliminate restrictions on numbers of pickets (p. 922); obstruction of ingress or egress held unlawful (p. 923); a court of equity has power to enjoin mass picketing under appropriate factual circumstances (p. 924); this may be easily and effectively accomplished by limiting the number of pickets (p. 924); opinion directed entry of preliminary injunction to prohibit obstructing by walking, marching or standing in groups or masses, and to limit the number of pickets to ten at or in front of or in the immediate vicinity of any one of six entrances and to require that they be spaced four feet apart except when passing (p. 925).

Goldwyn vs. *Screen Set Designers, Illustrators and Decorators* (1945), (not officially reported), 10 Labor Cases 68035 (paragraph 62751), Superior Court of California, Los Angeles County:—the constitutional right of free speech protects peaceful picketing (p. 68037); "the congregation of a large number of pickets is not calculated to appeal to the reasoning powers of persons who come into contact with the picket line, but is an exhibition of force" (p. 68037); the number of pickets may be limited so as to eliminate intimidation and interference with ingress and egress (p. 68038); no cases hold that the number of pickets cannot be reasonably limited (p. 68039); the facts did not justify an injunction restraining all picketing but did justify the limitation of the number of pickets and the regulation of their acts (p. 68040).

Lisse vs. *Local Union No.* 31, *Cooks, Waiters, Etc.* (1935), 2 Cal. 2d. 312, 41 P. 2d. 314:—mass picketing held to be unlawful (p. 315); statement of court as follows (p. 316): "In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault."

Goldfinger vs. *Feintuch* (1937), 276 N. Y. 281, 11 N. E. 2d. 910: statement of court as follows (p. 912): "Picketing is not peaceful where a large crowd gathers in mass formation, or there is shouting or the use of loud-speakers in front of a picketed place of business, or the sidewalk or entrance is obstructed by parading around in a circle or lying on the sidewalk. Such actions are illegal, and are merely a form of intimidation."

New England Novelty Co. vs. *Sandberg* (1944), 315 Mass. 739, 54 N. E. 2d. 915:—injunction had limited pickets to two at each entrance to a factory (p. 920); convictions for violation of injunction upheld.

Western Electric Co. vs. *Western Electric Emp. Ass'n.* (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695:—order to show cause limited pickets to ten at two entrance gates and five at other gates and required pickets to remain at least ten feet apart (p. 697); mass picketing to obstruct ingress and egress is not peaceful picketing and is unlawful (p. 697).

General Electric Company vs. *Andrew Peterson, et al.* (1946), 61 N. Y. Supp. 2d. 813 Supreme Court of New York, Schenectady County:—mass picketing and interfering with ingress and egress enjoined (p. 820); pickets limited to not more than twelve at main entrance and not more than three at other entrances, and pickets required to remain in motion and spaced in a single line at least fifteen feet apart (p. 821).

General Electric Co. vs. *United E. R. & M. Workers* (1946), 67 N. E. 2d. 802, Ohio, Court of Common Pleas, Cuyahoga County:—restraining order limited pickets to five at each of designated entrances to a factory (p. 802); violators of restraining order punished for contempt (p. 805).

E. The Amended Temporary Restraining Order was Constitutional under the Authorities.

1. Preliminary Statement.

The appellants apparently urge several bases for their contention that the Rice order was in violation of the right of freedom of speech and the right peaceably to assemble, as follows: (1) that the Rice order prohibited mass picketing; (2) that the Rice order imposed unreasonable limitations on the numbers of pickets; (3) that the Rice order was issued *ex parte* and without finding of great and imminent danger to the state and public; (4) that the Rice order was too broad in that it restrained too many persons; (5) that the Rice order was too broad geographically; and (6) that the Rice order contained vague and indeterminate language (Op. Br. pp. 42-47).

2. Mass Picketing.

We have already shown that the authorities establish that mass picketing to obstruct ingress and egress is not the exercise of the right of freedom of speech or the right peaceably to assemble, and that mass picketing for such purpose may be enjoined. Reference is made to the opinion in the *Thornhill* case, to the dissents of Mr. Justice Reed in the *Drivers Union* and *Carpenters Union* cases, and to the state court cases discussed in Part III D of this brief.

3. Limitations on Numbers.

We have already shown that the authorities establish that limitations on the numbers of pickets such

as were provided for by the Rice order do not violate the constitutional guarantees. Reference is made to the dissents of Mr. Justice Reed in the *Drivers Union* and the *Carpenters Union* cases, and to the state court cases discussed in Part III D of this brief.

In one respect the Rice order was more restrictive than most injunctions and restraining orders discussed in the authorities above referred to. This is the limitation to three of the number of pickets at each point of ingress and egress. However, such limitation was in accordance with the dissent of Mr. Justice Reed in the *Drivers Union* case, in which he suggested that the number of pickets might be limited to two or three individuals at a time. Also in *New England Novelty Co.* vs. *Sandberg* (1944), 315 Mass. 739, 54 N.E. 2d. 915, *supra,* convictions for violation of an injunction were upheld where the injunction had limited pickets to two at each entrance to a factory.

In another respect the Rice order was less restrictive than most of the injunctions and restraining orders discussed in the authorities above referred to,—in that the Rice order did not prohibit picketing anywhere. The Rice order did not limit the number of pickets other than at points of ingress and egress, and it permitted any number of pickets at other points, including approaches to points of ingress and egress, subject to the proviso that pickets in excess of three at any one point should be in motion and maintain a distance of not less than ten feet except when passing.

4. Ex parte.

Section 55 of the Hawaiian Organic Act (48 U. S.C. 562) provides that the legislative power of the Territory of Hawaii shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applic-

able. Acting under the authority contained in Section 55, the territorial legislature has granted to the territorial circuit judges full equity jurisdiction (Revised Laws of Hawaii, 1945, chapter 302). There can be no question but that full equity jurisdiction includes the right and power in appropriate cases to issue *ex parte* temporary restraining orders.

Ex parte temporary restraining orders are of short duration. Provision is always made by order to show cause for a hearing upon motion for a temporary injunction or permanent injunction. The defendants are entitled to proceed on the order to show cause. Where an *ex parte* temporary restraining order continues in existence for a longer period than above indicated, as was the case with respect to the Rice order, such can happen only with the approval or acquiescence of the parties.

Relatively few reported cases deal with *ex parte* temporary restraining orders in suits to enjoin picketing. No doubt this is because of the short duration of such orders and of the further fact that appeals, if taken, are customarily taken from subsequent injunctions. However, we note references to *ex parte* temporary restraining orders in *United States El. Motors* vs. *United E. R. & M. Workers* (1946), 166 P. 2d. 921, 922, *supra,* and in *Western Electric Co.* vs. *Western Electric Emp. Ass'n.* (1946), 137 N.J. Eq. 489, 45 Atl. 2d. 695, 697, *supra.* Furthermore, in *Frankfurter and Green, The Labor Injunction,* published in 1930, the statement is made on page 64 that reported cases disclose that not less than seventy *ex parte* temporary restraining orders had been granted during the previous twenty-seven years. We have no doubt that during the same period there were many more which were not either reported or referred to in reported cases. Also we have no doubt that many have been granted by state courts in more recent years.

Although *ex parte* temporary restraining orders in suits to enjoin picketing have been criticised on policy grounds, we know of no authority which has held them to be unconstitutional, and appellants have cited no such authority.

It is true that Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) prohibits courts of the United States from issuing such *ex parte* temporary restraining orders. The express prohibition in Section 7 is itself evidence that there is no constitutional prohibition. Furthermore, the prohibition in Section 7 leaves to local courts, state and territorial, as distinguished from courts of the United States, the power to issue such *ex parte* temporary restraining orders.

There is no statutory restriction applicable with respect to the courts of the Territory of Hawaii. In the absence of a statutory restriction, the question of whether or not to issue such an *ex parte* temporary restraining order must in each case be left to the circuit judge. It is a matter of common knowledge that obstructions to ingress and egress and other aspects of illegal picketing have in many recent instances been instituted forthwith upon the commencement of strikes. It is important that the circuit judges have power to deal with such situations, in order that law and order shall not be in suspense and in order that the rights of the public and of the employer and of non-striking employees shall not be interfered with by illegal action on the part of the pickets. There is no reason to believe that the circuit judges have failed or will fail to exercise appropriate judicial discretion in determining whether or not to issue *ex parte* temporary restraining orders.

The appellants criticise the Rice order for not including a finding of great and imminent danger to the state and public (Op. Br. p. 43). The appel-

lants do not disclose, and we do not know, the basis of this criticism. There is no statutory requirement for such a finding and certainly there is no constitutional requirement for such a finding. Furthermore, the general rules of equity do not require such a finding.

5. Persons Restrained.

The appellants object to the Rice order on the theory that it restrained too many persons. The particular objection is that it restrained the ILWU which according to the appellants has 100,000 members, employed in the Territory of Hawaii, in the continental United States, Puerto Rico and Canada (Op. Br. pp. 5, 43).

We believe it is common practice for restraining orders and injunctions which regulate picketing to apply their restraints to unions and their officers and members and also to all persons acting in concert with them. Such a restraining order or injunction cannot be effective unless it is applicable to all persons acting in concert with pickets. If it is appropriate to apply restraint to strikers and their pickets, it is appropriate also to apply the same restraints to the union.

Strikes of organized workers are called and are managed and are terminated pursuant to actions by their union. This is the usual situation. It is a matter of common knowledge, of which judicial notice may be taken. In the case of the Hawaii sugar strike of 1946 it was well known that the strike was called and managed by the ILWU. It can only be assumed that this fact was presented to Judge Rice or that Judge Rice took judicial notice thereof.

With respect to this objection of the appellants we refer to the following cases:

Westinghouse Elec. Corp. vs. *United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16, 21, *supra:*

—injunction restrained union and its officers and agents and members and all others acting in concert with them.

Lisse vs. *Local Union No.* 31, *Cooks, Waiters, Etc.* (1935), 2 Cal. 2d. 312, 41 P. 2d. 314, *supra:*—injunction restrained defendants (including union) and all persons acting for them or either of them in aid or in assistance of them or either of them.

Bayonne Textile Corp. vs. *American Fed. of S. Workers* (1934), 116 N. J. Eq. 147, 172 Atl. 551, 560: —injunction restrained unions and others.

Drivers Union vs. *Meadowmoor Co.* (1941), 371 Ill. 377, 21 N. E. 2d. 308, affirmed 312 U. S. 287, 61 S. Ct. 552, *supra:*—injunction restrained union, estimated by Mr. Justice Black in his dissenting opinion as having approximately 6,000 members (312 U. S. 299, 308, 61 S. Ct. 558, 562).

In the *Bayonne Textile Corp.* case, *supra,* the court pointed out that the management of the strike was in the hands of the union.

We do not believe that this objection of the appellants raises any problem of constitutional law.

6. Geographical Extent of Restraints.

The appellants object to the Rice order on the theory that it was too broad geographically (Op. Br. p. 44).

Where a labor injunction case involves a store or restaurant or factory, an injuncion or restraining order may be limited geographically to the limited geographic scope of the premises affected. On the other hand, where a labor injunction case involves an agricultural enterprise with several thousand acres of land, an injunction or restraining order may be extended geographically to the extended geographic scope of the premises affected.

It may be noted that in the *Drivers Union* case the Supreme Court upheld an injunction which prohi-

bited the picketing of stores in Chicago where milk distributed by Meadowmoor Dairies, Incorporated, was sold,—thereby recognizing that the geographical extent of an injunction against picketing may be co-extensive with the geographical extent of the picketing (312 U.S. 287, 298, 61 S. Ct. 552, 557).

The appellants also object to the Rice Order on the theory that it too narrowly defined "mass picketing without regard to the nature, size and scope of the industrial confiict" (Op. Br. pp. 44-45). However, under the Rice order there could literally have been hundreds or even thousands of pickets,—all around the plantation premises and on approaches to the plantation premises and even within the plantation premises,—so long as the pickets at each point of ingress and egress were limited to three and pickets in excess of three at other points were in motion and maintained a distance of ten feet except when passing.

The appellants state that the plantation premises include twenty company towns and they refer to *Marsh* vs. *Alabama,* 326 U.S. 501, 66 S. Ct. 276 (Op. Br. pp. 44, 45). The Rice order did not violate the doctrine of *Marsh* vs. *Alabama.* Under that doctrine the constitutional guarantees apply in a company town to the same extent as they apply in a public town. There is nothing in the doctrine, however, that gives the constitutional guarantees any greater scope in a company town than they have in a public town. The Rice order did not differentiate between conduct on plantation premises (including company towns) and conduct elsewhere. It permitted picketing in company towns subject only to the same limitations which were applied to picketing elsewhere. Furthermore, under the Rice order assembling in the company towns, for other purposes than to obstruct ingress and egress or than in connection with picketing, was not prohibited.

7. Vague and Indeterminate Language.

The appellants object to the Rice order on the theory that it included vague, indeterminate language (Op. Br. p. 45). This objection is also made in paragraph (c) of the statement of appellants pursuant to Rule 19, Subdivision 6 (Tr. p. 379), in which paragraph the appellants claim that the Rice order was void upon the ground that is was vague, ambiguous and confusing.

The appellants do not indicate, in any papers filed with this Court, just wherein the Rice order contained vague, indeterminate language. In order to ascertain what the appellants have in mind in the objection, it is necessary to consider the objection as it was amplified before the District Court, as follows: (1) that the pickets were required to determine at their peril what comprised points of ingress and egress; (2) that the pickets were required to determine whether in any manner any act of theirs had the effect of accomplishing the prohibited act; and (3) that the Rice order was not written in the parlance of the working man on the Island of Kauai, many of whom do not speak English.

We do not believe that the Rice order was void for ambiguity. It was couched in language similar to the language customarily used in injunctions and restraining orders which regulate picketing. In this connection reference is made to the state court cases listed in Part III D of this brief.

Where a labor injunction case involves an agricultural enterprise with several thousand acres of land it is not feasible to list every point of ingress and egress in an injunction or restraining order. Presumably points of ingress and egress are known to the employees, or if not, they can be ascertained. In the second count of the information against them the appellants are charged with picketing in groups

of more than three at points of ingress and egress (Tr. pp. 361-364). The complaint in the instant case contains no indication that the appellants did not know that the points where they are charged with such picketing are points of ingress and egress (Tr. pp. 5-21). Furthermore, any invalidity of any portion of the Rice order, on the basis of indefiniteness or ambiguity, would not raise a problem of constitutional law. It might be pointed out in addition that in the first count of the information against them the appellants are charged with engaging in mass picketing to obstruct ingress and egress,—in violation of paragraph (7) of the Rice order (Tr. pp. 358-361). There is no indefiniteness or ambiguity in paragraph (7).

If a portion of an injunction or restraining order is invalid because of indefiniteness or ambiguity, that fact does not excuse the violation of another portion which is definite and certain. Also, if a defendant or party enjoined is in doubt as to the meaning and intent of an injunction or a restraining order it is his duty to apply to the court for such modification of the language as will remove the indefiniteness and uncertainty. In support of the foregoing rules see 43 C.J.S. 1008-1009 and the following authorities: *Flannery* vs. *People* (1907), 225 Ill. 62, 80 N.E. 60, 62-63; *Seaboard Air Line Ry. Co.* vs. *Tampa Southern R. Co.* (1931), 101 Fla. 468, 134 So. 528, 533; *Ex parte Connor* (1940), 240 Ala. 327, 198 So. 850, 853; *Liquor Control Commission* vs. *McGillis* (1937), 91 Utah 568, 65 P. 2d. 1136, 1140; and *People* vs. *Seffill* (1946), 74 Cal. App. 2d. 967, 168 P. 2d. 497, 507.

The Rice order did not require the pickets to determine whether in any manner any act of theirs had the effect of accomplishing prohibited acts. We are particularly interested in paragraph (7). Pa-

ragraph (7) prohibited mass picketing and assembling in crowds,—but only where such action had for its purpose to interfere with ingress or egress. All that the persons massing or congregating had to determine was whether their purpose was to interfere with ingress or egress.

We do not believe that any comment is required with respect to the suggestion made to the District Court that the Rice order should have been translated into the various tongues, including Oriental languages and Filipino dialects, used by laborers on the Island of Kauai.

F. The Contention that the Amended Temporary Restraining Order was Invalid on its Face is Untenable.

The appellants contend that the Rice order must be judged on its face and on that basis that it is unconstitutional under the principle of the *Thornhill* case (Op. Br. pp. 45-46).

Such contention by the appellants indicates that the issue of constitutional law in the instant appeal is not difficult. An injunction or restraining order relating to picketing must be adjusted to a particular situation in accordance with the settled practice of equity and in an appropriate case may even establish an absolute prohibition against picketing. It necessarily follows that such an injunction or restraining order cannot be held to be invalid on its face.

Such contention by the appellants was amplified when they were before the District Court. The amplified contention is discussed *supra* at pages 19 to 20, in connection with the analysis of the *Drivers Union* case.

In view of the nature of the contention of the appellants, i.e., that the Rice order is unconstitution-

al on its face, there is no need, in disposing of the constitutional issue, to consider the facts set forth in the answer in the instant case or in the exhibits to the answer.

G. Conclusion.

We therefore conclude that the fourth count of the complaint in the instant case, which deals with the constitutional issue (Tr. pp. 14-20), does not state a claim for relief.

PART IV.

THE AMENDED TEMPORARY RESTRAINING ORDER WAS NOT IN VIOLATION OF ANY SUBSTANTIVE RIGHTS OF THE APPELLANTS UNDER THE CLAYTON ACT OR THE NORRIS-LAGUARDIA ACT.

A. Introduction.

The appellants contend that the Rice order was in violation of substantive rights claimed by them under the Clayton Act and the Norris-LaGuardia Act (Tr. pp. 13-14; Op. Br. pp. 32-41; *Wirtz* Op. Br. pp. 74-82, and related matter pp. 55-74 and 82-88, incorporated by reference in Op. Br. p. 10).

The appellants refer to Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act (Op. Br. p. 36; *Wirtz* Op. Br. pp. 75-76).

B. The Substantive Rights Related to Federal Law Only and Do Not Affect the Law of the Territory of Hawaii.

1. Section 20 of the Clayton Act.

Section 20 of the Clayton Act (29 U.S.C. 52) contains two paragraphs:

The first paragraph provides that, with certain exceptions, no restraining order or injunction shall be granted by any court of the United States in any case

between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment. The first paragraph relates to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in certain types of cases.

The second paragraph of Section 20 contains the critical provisions, and is as follows (italics supplied):

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peaceably obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending. advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

The second paragraph refers to restraining orders and injunctions mentioned in the first paragraph, i.e., restraining orders and injunctions issued by courts of the United States in certain types of cases. The second paragraph provides that no such restraining order or injunction shall prohibit certain specified acts. To this

extent the second paragraph, like the first paragraph, relates to procedural matters only, i.e., it limits the power of courts of the United States to grant injunctive relief in certain types of cases. However the last clause of the second paragraph provides that none of the specified acts shall be considered or held to be violations of any law of the United States. The last clause gives to the specified acts a status of substance, and is the basis of the substantive rights under Section 20.

The motive behind the adoption of Section 20, including the last clause of the second paragraph thereof, was to restrict the issuance of restraining orders and injunctions in suits under the Sherman Act (15 U.S.C. 1-7), and also to amend the substantive provisions of the Sherman Act to provide that the specified acts should not be deemed to be in violation of the Sherman Act. And because of a suggestion made to Congress that certain judges had relied on federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute cases it was provided in the last clause of the second paragraph that none of the specified acts should be considered or held to be in violation of *any* law of the United States,—rather than merely in violation of the Sherman Act.

The legislative history of the last clause is extremely informative on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present Section 20 was Section 18. At that time the language of the last clause was as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be unlawful".

The Senate Committee recommended that the word "unlawful" be eliminated and that the words "violations of the antitrust laws" be substituted. As so amended the language of the last clause would have been as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of the anti-trust laws".

On the floor of the Senate an amendment was moved and adopted to substitute the words "any law of the United States" for the words "the antitrust laws". By this amendment the final language was adopted, as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States".

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be "unlawful". It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state statutory law. It was further pointed out that the first of the specified acts was "terminating any relation of employment", and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible to an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary to the terms of the contract. The discussion and the changes made in the language of the last clause, establish that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) so that the provisions of the Sherman Act (and of any such other federal legislation) should not be deemed to prohibit any of the specified acts. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-143367.

The relationship of the substantive aspects of Section 20 of the Clayton Act to the general provisions of the Sherman Act is pointed out by the Supreme Court in *United States* vs. *Hutcheson,* 312 U.S. 219, 229-230, and 236-237, 61 S. Ct. 463, 465, and 468, in the following language:

> "Section 20 of the Act, which is set out in the margin in full, withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'
>
> * * *
>
> "It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure."

Numerous decisions hold that Section 20 does not prohibit injunctions in labor dispute cases in state courts and does not in any way modify substantive state law. In *Drivers Union* vs. *Meadowmoor Co.* (1941), 312 U.S. 287, 61 S. Ct. 552, *supra,* the Supreme Court recognized the right of a state court to issue an injunction in a labor dispute case. The same right has been recognized in many state court cases, some of which are cited *supra,* in Part III D of this brief.

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Act (and any other federal legislation) should not be deemed to prohibit "terminating any relation of employment", to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights and remedies for breach of contract than it in-

tended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

2. Section 4 of the Norris-LaGuardia Act.

Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) purports by its language to relate to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in cases involving or growing out of labor disputes.

The appellants rely upon the specified acts listed in paragraphs (e) and (f) of Section 4. Said paragraphs are as follows:

> "(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> "(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;".

The substantive rights under Section 4 exist by reason of the opinion of the Supreme Court in the *Hutcheson* case. The opinion states that where Congress expresses a national policy, as by the enactment of the Norris-LaGuardia Act, in terms of the imposition of restrictions on the power of courts of the United States to issue restraining orders and injunctions in labor dispute cases, the national policy should be recognized in criminal cases as well as in equity cases (312 U. S. 219, 234-235, 61 S. Ct. 463, 467). The opinion also states that whether trade union conduct constitutes a violation of the Sherman Act is to be determined only by reading the Sherman Act and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct (312 U. S. 219, 231, 61 S. Ct. 463, 466). If, as this statement indicates, the Norris-LaGuardia Act, including Section 4, provides exceptions

to the general language of the Sherman Act, the exceptions must be of substantive significance and not merely as of procedural significance in equity cases. In addition the opinion states that immunized trade union activities as redefined in the Norris-LaGuardia Act are removed by Section 20 of the Clayton Act from the taint of being a "violation of any law of the United States", including the Sherman Act (312 U. S. 219, 236, 61 S. Ct. 463, 468).

It would appear therefore that the specified acts listed in Section 4 of the Norris-LaGuardia Act are in *pari materia* with the specified acts listed in Section 20 of the Clayton Act,—i.e., both sets of specified acts have substantive significance as not being in violation of any law of the United States.

3. The Effect on the Sherman Act, with Particular Reference to the Effect within a Territory.

The Sherman Act in general language prohibits combinations and conspiracies in restraint of trade or commerce. Section 1 of the Sherman Act (15 U.S.C. 1) prohibits combinations and conspiracies in restraint of trade or commerce among the several states or with foreign nations. Section 3 of the Sherman Act (15 U.S.C. 3) prohibits combinations and conspiracies in restraint of local trade or commerce within a territory.

Prior to the enactment of Section 20 of the Clayton Act and of Section 4 of the Norris-LaGuardia Act various types of trade union conduct were held to be in violation of the Sherman Act, i.e., to constitute combinations or conspiracies in restraint of trade or commerce. The purpose of the substantive aspects of Section 20 of the Clayton Act was to amend the Sherman Act so that types of labor conduct covered by the specified acts listed in Section 20 would no longer be held to be in violation of the Sherman Act. Similarly the purpose of the substantive aspects of Section 4 of the Norris-LaGuardia Act was to amend the Sherman Act so that types of labor

conduct covered by the specified acts listed in Section 4 would no longer be held to be in violation of the Sherman Act. In each case the types of labor conduct no longer constitute illegal combinations or conspiracies in restraint of trade or commerce. This is true whether the trade or commerce is interstate or foreign trade or commerce or is local trade or commerce in a territory.

We are therefore dealing with a federal law, the Sherman Act, and its exceptions. An exception to a federad law limits the impact of that federal law, but it does not affect local law whether state or territorial.

Where a federal law applies in the Territory of Hawaii any exceptions to that federal law limit the impact of that federal law in its application in the Territory,—but such exceptions do not restrict the power of the Territory with respect to matters of local law. More particularly, the exceptions to the Sherman Act created by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act limit the impact of Section 3 of the Sherman Act in its application in the Territory of Hawaii,—i.e., none of the specified acts constitute illegal combinations or conspiracies in restraint of local trade or commerce in the Territory. (Also, in view of the general language of the last clause of Section 20, such exceptions also limit the impact in the Territory of Hawaii of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts.) However such exceptions do not affect, and do not purport to affect, the local law of the Territory[1] on matters relating to the maintenance of peace and order, and having no relation to the antitrust laws.

The prosecution which the appellants face is not for alleged violations of the Sherman Act. If the appellants

[1]The term "local law of the Territory" is used to describe all local law, whether existing by enactment of the territorial legislature or whether embodied in common law or other rights enforced by the courts of the Territory.

faced prosecution for alleged violations of the Sherman Act then it would be appropriate to consider the amended scope of the Sherman Act, as limited by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act. The appellants however face prosecution for violating local law of the Territory, in the shape of a restraining order which had for its purpose to maintain peace and order and protect the co-relative rights of all persons concerned in a labor dispute. In such a prosecution neither the original scope of the Sherman Act nor the amended scope thereof can have a n y relevancy whatsoever.

We will attempt, with reference to three examples, to illustrate our position with respect to the effect on the Sherman Act of the exceptions to the Sherman Act established by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act. For the purposes of these examples we will assume that paragraphs (e) and (f) of Section 4 provide in effect that mass picketing to obstruct ingress and egress does not constitute a violation of the Sherman Act (or of a n y other federal legislation).

Example 1: If such mass picketing is indulged in in New Jersey, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with interstate commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 2: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combinaion or conspiracy in restraint of interstate commerce.

Example 3: If such mass picketing is indulged in in Hawaii with respect to an enterprise which is engaged only in local commerce in the Territory, and such mass picketing interferes with such local commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combination or conspiracy in restraint of local commerce in the Territory.

But the fact that mass picketing in New Jersey to obstruct ingress and egress is not in violation of the Sherman Act as applied to interstate commerce does not mean that such mass picketing is not in violation of the local law of New Jersey. See *Isolantite* vs. *United Elec., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183, and *Western Electric Co.* vs. *Western Electric Emp. Ass'n.* (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695. Similarly the fact that mass picketing in Hawaii to obstruct ingress and egress is not in violation of the Sherman Act, as applied to interstate commerce, or as applied to local commerce in the Territory, does not mean that such mass picketing is not in violation of the local law of the Territory.

The fact that it is expressly provided that certain specified acts are not in violation of any law of the United States, including the Sherman Act, does not mean that a state or a territory cannot prohibit such specified acts. Embezzlement, except from agencies of the federal government and possibly under other special circumstances, is not in violation of any law of the United States. It is, however, a crime under Chapter 255 of the Revised Laws of Hawaii 1945. Similar situations exist with respect to most of the common felonies and misdemeanors. The same situation should be held to exist with respect to the non-statutory local law, enforced by courts of equity in pursuance to their general jurisdiction, for the purpose of maintaining peace and order.

The Sherman Act might very well have been interpreted by the courts as not being applicable to labor

combinations. (In fact the purpose of Section 20 of the Clayton Act, and subsequently the purpose of the Norris-LaGuardia Act, were to correct what were believed to be errors in the interpretation of the Sherman Act by the courts.) If the Sherman Act had been interpreted as above suggested then there would have been no reason for the express provisions of Section 20 of the Clayton Act or of Section 4 of the Norris-LaGuardia Act. In such case the federal law, i.e., the meaning of the Sherman Act, would be the same as it is now. But in such case certainly it would never be urged that the regulation of conduct in labor disputes is beyond the control of state or territorial power merely because such regulation is not covered by the Sherman Act. The situation, so far as state or territorial authority is concerned, cannot be different when the interpretation of the Sherman Act is corrected by the provisions of Section 20 and Section 4 than the situation would be if the Sherman Act had always been interpreted as not being applicable to labor combinations and had not required correction.

The appellants contend that Section 20 and Section 4 not only operate to amend the Sherman Act but also state the substantive law of the Territory of Hawaii on all matters whatsoever, including matters having no connection with the Sherman Act.

The appellants refer to the fact that Congress, in the enactment of the Sherman Act, the Clayton Act, and the Norris-LaGuardia Act, acted under its "plenary power" to legislate for the territories, as well as under its power to regulate interstate and foreign commerce (Op. Br. p. 34; *Wirtz* Op. Br. pp. 72-74). It is true that Congress has plenary power, subject to constitutional limitations, to legislate for the territories. It is also true that Congress acted under such plenary power in the Sherman Act, in prohibiting combinations or conspiracies in restraint of local trade or commerce in the territories. It is also true that Congress acted under such plenary power in establishing the exceptions to the

Sherman Act which are provided for in Section 20 and Section 4.

But in the enactment of the Sherman Act Congress did not exercise the full scope of its plenary power to legislate for the territories. It exercised such plenary power only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce. It did not act, and did not purport to act, with respect to the local law of any territory on matters relating to the maintenance of peace and order and having no relation to combinations or conspiracies in restraint of trade or commerce.

Similarly, in so far as Congress amended Section 3 of the Sherman Act by the enactment of Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act, Congress did not exercise the full scope of its plenary power to legislate for the territories. It exercised such plenary power only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce. Section 3 of the Sherman Act prohibits combinations or conspiracies in restraint of local trade or commerce in the territories generally. Under Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act, certain specified acts, even though they might otherwise constitute combinations or conspiracies in restraint of such trade or commerce, are not violations of Section 3 of the Sherman Act. Congress, by providing exceptions to the application of Section 3 of the Sherman Act, cannot be deemed to have had any intent to do anything else. More specifically, Congress cannot be deemed to have had any intent to take away from the Territory of Hawaii its normal police powers with respect to matters which are not related to combinations or conspiracies in restraint of trade or commerce.

Also the appellants rely on a reference in the *Hutcheson* opinion to "allowable conduct" (312 U.S. 219, 236,

61 S. Ct. 463, 468) in support of their contention that the specified acts state the substantive law of the Territory of Hawaii on all matters whatsoever (Op. Br. pp. 33, 36; *Wirtz* Op. Br. p. 75). The reference in the *Hutcheson* opinion was included within the following language (italics supplied):

> "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such *allowable conduct* from the taint of being a 'violation of any law of the United States,' including the Sherman Law."

It is clear that the Supreme Court, in referring to allowable conduct, meant conduct which was not in violation of any federal legislation, including the Sherman Act.

That the substantive provisions of Section 20 of the Clayton Act operate only in the field of federal law is assumed by the Supreme Court. In *Allen-Bradley Co.* vs. *Union* (1945), 325 U. S. 797, 807, 65 S. Ct. 1533, 1538-1539, the Supreme Court referred to the specific acts listed in Section 20 of the Clayton Act as having been declared by Section 20 "not to be violations of federal law".

It is a necessary conclusion therefore that, although Section 20 and Section 4 are applicable within the Territory of Hawaii as limitations on the effect in the Territory of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) they are not applicable as limiting the territorial government, including the territorial courts, with respect to matters of local law.

C. The Term "law of the United States", as Used in Section 20 of the Clayton Act and in the Decision in the *Hutcheson* case, has a Well Defined Meaning, Recognized by the Courts and by Congress, Which does not Include the Law of a Territory.

1. Decisions Defining "law of the United States".

In *Maxwell* vs. *Federal Gold & Copper Co.* (1907), 155 F. 110, 112, the Circuit Court of Appeals for the Eighth Circuit stated:

> "But the laws of the territories are not laws of the United States".

The issue under discussion was whether the fact that the defendant was a corporation organized under a law of the Territory of Arizona gave jurisdiction to the federal courts. Jurisdiction was claimed on the theory that the corporation was organized under a law of the United States. The Court held the claim to be untenable,—because a law of the Territory of Arizona was not a law of the United States. The holding was despite the general rule, recognized by the Court, that actions brought against corporations organized pursuant to acts of Congress do arise under laws of the United States. See *Pacific Railroad Removal Cases* (1884), 115 U. S. 1, 11, 5 S. Ct. 1113, 1118; *Texas & Pacific Railway Co.* vs. *Cox* (1892), 145 U. S. 593, 603, 12 S. Ct. 905, 908; and *United States Freehold Land & Emigration Co.* vs. *Gallegos* (1898), 89 F. 769.

In *Ex parte Moran* (1906), 144 F. 594, 603 the Circuit Court of Appeals for the Eighth Circuit stated:

> "The laws of the territory are not laws of the United States,* * *".

The issue under discussion was whether a prisoner could be discharged by use of the writ of habeas corpus. Congress had provided various grounds pursuant to which the writ might be issued by federal courts. The only ground possibly applicable was that the prisoner was "in custody in violation of the Constitution or of a law or treaty of the United States." The claim of the petitioner was that he was in custody in violation of a statute of the Territory of Oklahoma. The Court discharged the writ,—because a law of the Territory of Oklahoma was not a law of the United States.

In *Am. Security Co.* vs. *Dist. of Columbia* (1912), 224 U. S. 491, 32 S. Ct. 553, and in *Washington & Mt. Vernon Ry.* vs. *Downey* (1915), 236 U. S. 190, 35 S. Ct. 406, the Supreme Court held that an act of Congress enacted as a local law relating to the District of Columbia was not a law of the United States.

In *Puerto Rico* vs. *Rubert Co.* (1940), 309 U. S. 543, 60 S. Ct. 699, the Supreme Court held that Section 39 of the Organic Act of Puerto Rico (48 U. S. C. 752) was not one of the laws of the United States, within the meaning of Section 256 of the Judicial Code (28 U. S. C. 371). Section 39 of the Organic Act of Puerto Rico restricted every corporation authorized to engage in agriculture to the ownership and control of not to exceed 500 acres of land. Section 256 of the Judicial Code vested exclusive jurisdiction in courts of the United States of all suits for penalties and forfeitures incurred under the laws of the United States. The Court held that, notwithstanding Section 256 of the Judicial Code, the Puerto Rican legislature could give to a Puerto Rican territorial court jurisdiction of a *quo warranto* proceeding against a corporation for violation of Section 39 of the Organic Act.

The foregoing cases establish, first, that a law of the Territory is not a law of the United States, and second, that an act of Congress enacted for the District of Columbia or for a territory is not a law of the United States. It follows that when Congress provides that certain specified acts are not to be considered or held to be violations of any law of the United States, it does not mean that the specified acts operate as restrictions on a territorial government, including its courts, with respect to normal matters of local law.

2. Congressional Recognition of Distinction Between "law of the United States" and Local Laws of a Territory.

In both the Sherman Act and the Clayton Act Congress recognized the distinction between a law of the United States and a law of a territory.

In the Sherman Act this recognition appears in Section 8 (15 U.S.C. 7) which contains the following definition of the term "person" (italics supplied):

> "The word 'person', or 'persons', wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, *the laws of any of the Territories,* the laws of any State, or the laws of any foreign country."

In the Clayton Act this recognition appears in Section 1 (15 U.S.C. 12) which contains the following definition of the term "person":

> "The word 'person' or 'persons', wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The recognition by Congress, in the Sherman Act and in the Clayton Act, of the distinction between a law of the United States and a law of the Territory, establishes conclusively that it was not the intent of Congress, by the last clause of Section 20 of the Clayton Act, to affect the local law of a territory, whether statutory or nonstatutory, having to do with the maintenance of the peace and order, and having no relation to the antitrust laws.

D. A Limitation upon the Normal Police Powers of the Territory of Hawaii is not to be Implied.

The Hawaiian Organic Act (48 U.S.C. 491 et seq.) gives to the Territory of Hawaii broad powers of local self-government. In *Puerto Rico* vs. *Shell Co.* (1937), 302 U. S. 253, 260-263, 58 S. Ct. 167, 170-172, the Supreme Court had under consideration provisions of the Puerto Rican Organic Act (48 U.S.C. 731 et seq.) similar to those of the Hawaiian Organic Act. The Supreme Court stated that the grant of legislative power to the govern-

ment of Puerto Rico "is as broad and comprehensive as language could make it", and that the aim of the Puerto Rican Organic Act "was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories."

We recognize of course that Congress can and does legislate with respect to the local law of the territories. Congress has in various instances legislated with respect to local trade or commerce in the territories at the same time as and by the same acts by which it has legislated with respect to interstate and foreign commerce. The Sherman Act is one instance.

But where Congress has legislated with respect to the local law of the territories, it has done so expressly. In the Sherman Act, for example, the prohibition against combinations and conspiracies in restraint of local trade or commerce within a territory is expressly provided for in Section 3.

It is our position that an intent on the part of Congress to limit the normal police powers of a territory is not to be implied from congressional language dealing with another subject matter. As above shown the purpose of the last clause of Section 20 of the Clayton Act was to make substantive amendments to the Sherman Act (and to any other federal legislation that might be pertinent). The last clause does not expressly limit the normal police powers of the Territory of Hawaii. There is no basis for implying any such limitation.

In this connection reference is made to *Inter-Island Co.* vs. *Hawaii* (1938), 305 U. S. 306, 312, 59 S. Ct. 202, 205, the opinion of which contains the following:

> "The Shipping Act invested the Shipping Board with authority over some of these matters. But no language in that Act indicates that Congress intended to withdraw all of the territorial Commission's jurisdiction over territorial water carriers.

While Congress had complete power to repeal the entire territorial Public Utilities Act, 'an intention to supersede the local law [of a Territory] is not to be presumed, unless clearly expressed.' "

E. Assuming that the Substantive Rights Affect the Local Law of the Territory of Hawaii, the Substantive Rights were not Violated by the Rice Order.

The thesis to be presented in this part of our brief is that even if the substantive provisions of Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act operate to modify the local substantive law of the Territory, nevertheless the Rice order was properly issued and was not in violation of such substantive rights. It is our position that the substantive provisions of Section 20 and Section 4, in so far as they are pertinent to the problem of picketing, give no greater rights than the constitutional right of "freedom of speech" and the constitutional right "peaceably to assemble".

In this discussion reference will be made particularly to the provisions relied on by the appellants, to wit, paragraphs (e) and (f) of Section 4, as follows:

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;".

In order that these provisions may be considered in proper perspective we quote also the pertinent provisions of the First Amendment, as follows:

"Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, * * *."

Paragraph (e) relates to "Giving publicity to the existence of, or the facts involved in, any labor dispute

***" This is no more nor less than one aspect of "freedom of speech" guaranteed by the First Amendment. Paragraph (e) is more restrictive than the First Amendment because paragraph (e) relates to "giving publicity" only in connection with labor disputes; whereas the First Amendment guarantees the right of "freedom of speech" in all matters.

Subsequent language of paragraph (e) lists means for "giving publicity", i.e., "by advertising, speaking, patrolling, or by any other method not involving fraud or violence". However such subsequent language all relates to the matter of "giving publicity". In other words, if any group of persons patrol or take other action for a purpose other than to give publicity, as for example, to obstruct ingress or egress, they do not come within the scope of paragraph (e). Obstructing ingress or egress is a different and separate matter from "giving publicity". The subsequent language of paragraph (e) might conceivably justify mass picketing in a case where the mass picketing has for its purpose to give publicity but it certainly does not justify mass picketing where the purpose of the mass picketing is to obstruct ingress or egress.

Paragraph (f) relates to "assembling peaceably to act or to organize to act in promotion of their interest in a labor dispute;". This is no more than one aspect of the right "peaceably to assemble" guaranteed by the First Amendment. There can be no possible basis for arguing that the term "assembling peaceably" as used in paragraph (f) means any more than the term "peaceably to assemble" as used in the First Amendment. Paragraph (f) is more restrictive than the First Amendment because paragraph (f) relates to "assembling peaceably" only in relation to labor disputes; whereas the First Amendment guarantees the right "peaceably to assemble" in all matters.

It has already been shown that the constitutional

rights of "freedom of speech" and "peaceably to assemble" are not absolute rights, i.e., they can be forfeited if abused and they can be regulated so as not to interfere with the co-relative rights of others. Certainly the statutory rights under paragraph (e) and paragraph (f) are no more absolute than the constitutional rights.

It follows that the regulations of picketing which are permitted notwithstanding the constitutional rights of "freedom of speech" and "peaceably to assemble" are also permitted notwithstanding the provisions of paragraph (e) and paragraph (f).

It has more specifically been shown that the constitutional rights of "freedom of speech" and "peaceably to assemble" do not give the right to engage in mass picketing to obstruct ingress or egress. Certainly then the provisions of paragraphs (e) and (f) do not give the right to engage in mass picketing to obstruct ingress or egress.

It has further been shown that the same constitutional rights do not prohibit limiting the numbers of pickets where such action is necessary in order to eliminate obstructions to ingress or egress or otherwise to maintain peace and order. Certainly then the provisions of paragraphs (e) and (f) also do not prohibit the limiting of the numbers of pickets under the same circumstances.

Various states have so-called "Little Norris-LaGuardia Acts", containing provisions identical with or similar to the provisions of paragraphs (e) and (f). The decisions under such legislation hold that, notwithstanding such provisions, mass picketing can be regulated or prohibited and the numbers of pickets may be limited. We refer to the decisions in the following cases (which are discussed more fully in Part III D of this brief): NEW JERSEY: L. 1941, c. 15, § 1, R. S. Cum. Supp. 2: 29-77.1,—*Isolantite* vs. *United Elec., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183, *Western Electric Co.* vs. *Western Electric Emp. Ass'n.* (1946), 137 N. J.

Eq. 489, 45 Atl. 2d. 695; NEW YORK: L. 1935, c. 477, Civil Practice Act, § 876-a (f) (5),—*Goldfinger* vs. *Feintuch* (1937), 276 N. Y. 281, 11 N. E. 2d. 910, *General Electric Company* vs. *Andrew Peterson, et al.*, (1946), 61 N. Y. Supp. 2d. 813; PENNSYLVANIA: Purdon's Statutes (1937), Title 43, Sec. 206(a)—206(q),—*Westinghouse Elec. Corp.* vs. *United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16; WASHINGTON: L. 1933 Exsc. 7, Pierce's Code 1939, § 3462-24,—*Weyerhaeuser Timber Co.* vs. *Everett Dist. Council* (1941), 11 Wash. 2d. 503, 119 P. 2d. 643.

Appellants rely on *Wilson & Co.* vs. *Birl* (1939), 27 F. Supp. 915, 105 F. 2d. 948 (Op. Br. pp. 38-40).

In the *Birl* case it was held that a court of the United States could not enjoin mass picketing in a labor dispute, by reason of the provisions of Section 4 of the Norris-LaGuardia Act,—irrespective of whether mass picketing was illegal in Pennsylvania, where the case arose. We do not believe that the decision in the *Birl* case is applicable in the present case, for reasons stated below.

In the first place both the District Court and the Circuit Court of Appeals in the *Birl* case treated Section 4 as relating solely to the jurisdiction of courts of the United States and did not consider it as setting forth any substantive provisions of federal law. The opinions of both courts indicate that both courts were most concerned with the introductory portion of Section 4 which provides that "No court of the United States shall have jurisdiction * * *" etc.

In this connection it should be pointed out that the problem is considerably more complicated when one deals with substantive provisions than it is when one deals merely with procedural restrictions on courts of the United States. The provisions of the First Amendment which guarantee the right of "freedom of speech" and the right "peaceably to assemble" are substantive pro-

visions. As shown above the rights guaranteed by such substantive provisions are not absolute and also such rights do not prevent restrictions on picketing when picketing is used for purposes unrelated to the guaranteed rights. The problems of interpretation which arise with respect to the freedoms guaranteed by the First Amendment also arise with respect to the language of Section 4, —where such language is taken as establishing substantive provisions of federal law rather than as merely setting forth limitations on the jurisdiction of courts of the United States.

In the second place both the District Court and the Circuit Court of Appeals in the *Birl* case dealt with mass picketing as a means of "giving publicity" and "assembling peaceably". It does not appear from the opinions in the *Birl* case that there was any evidence that mass picketing was used as a means of obstructing ingress or egress. Where mass picketing is used as a means of obstructing ingress or egress then it does not constitute "giving publicity" under paragraph (e) or "assembling peaceably" under paragraph (f). On the other hand, in the instant appeal the Rice order does not prohibit mass picketing as a method of "giving publicity" or as a method of "assembling peaceably", but prohibits mass picketing only where it has for its purpose to obstruct ingress or egress.

Furthermore if the decisions in the *Birl* case are taken to mean that substantive rights under Section 4 include the right to engage in mass picketing whatever its purpose, then such decisions are contrary to statements of the United States Supreme Court with reference to the scope of the First Amendment.

The appellants also rely on *Carter* vs. *Herrin Motor Freight Lines* (1942), 131 F. 2d. 557 (Op. Br. pp. 40-41). The opinion in this case contains passing references to Section 4 of the Norris-LaGuardia Act but the decision is not based on that Section. The opinion does not dis-

tinguish between "giving publicity" and "assembling peaceably" on the one hand, and such acts as obstructing ingress or egress on the other hand. The decision is based on Sections 7 and 8 of the Norris-LaGuardia Act (29 U.S.C. 107 and 108). The plaintiff, who was attempting to obtain injunctive relief in a labor dispute in a court of the United States, had not complied with the requirements of Section 7 because it had not shown that the public officers charge with the duty to protect its property were unwilling or unable to furnish adequate protection. Also the plaintiff had not complied with the requirements of Section 8 because it had failed to make every reasonable effort to settle the dispute by negotiation or mediation or arbitration.

We have dealt in detail only with paragraphs (e) and (f) of Section 4 of the Norris-LaGuardia Act. However the same principles apply to all of the other specified acts listed in Section 4 and to the specified acts listed in Section 20 of the Clayton Act. All of such specified acts, in so far as they have any pertinence to the question of picketing, are comparable to the constitutional right of "freedom of speech" and to the constitutional right "peaceably to assemble".

One might wonder what was the need for Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act if such sections merely restate constitutional rights. The answer is that as shown in Part III C of this brief, the constitutional basis for picketing was not given judicial recognition until 1937 and thereafter, subsequent to the enactment of both the Clayton Act and the Norris-LaGuardia Act.

F. Conclusion.

We therefore conclude that the third count of the complaint in the instant case, dealing with the issue of substantive rights (Tr. pp. 13-14), does not state a claim for relief.

PART V.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII SHOULD NOT INTERFERE WITH THE PENDING PROCEEDINGS IN THE CIRCUIT COURT OF THE TERRITORY OF HAWAII.

A. The Relationships Between the District Court for the District of Hawaii and the Courts of the Territory of Hawaii are the Same as the Relationships Between the Constitutional District Courts and the Courts of the Several States.

Section 86(c) of the Hawaiian Organic Act (48 U.S.C. 642) provides that the United States District Court for the District of Hawaii "shall have the jurisdiction of district courts of the United States, * * *."

Section 86(d) of the Hawaiian Organic Act (48 U.S.C. 645) contains the following:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

A result of Section 86(c) is that if a constitutional district court is precluded by statute or rule of law from interfering in state court proceedings similar to the proceedings in which the Rice order was issued, the District Court for the District of Hawaii is precluded from interfering with the territorial court proceedings. Section 86(d) has the same effect.[1]

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[1]The distinction should be noted between (1) the relationship of district courts (including constitutional district courts and the District Court of the Territory) and state and territorial courts and (2) the jurisdiction of district courts (including constitutional district courts and the District Court of the Territory) with respect to

This Court has recognized that the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts. See *Wilder's S. S. Co.* vs. *Hind* (1901), 108 F. 113, 115-116, affirmed 183 U. S. 545, 22 S. Ct. 225, and *Yeung* vs. *Territory of Hawaii,* 132 F. 2d. 374, 378.

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matters of territorial law as distinguished from matters of state law. Certain provisions of the Judicial Code give to the constitutional district courts specified powers with respect to specified matters of state action, without mentioning territorial action. If the term "State" as used in these provisions is interpreted as not including a territory, then the constitutional district courts do not have jurisdiction with respect to territorial action as to these matters, and also the District Court for the Territory of Hawaii, having the same jurisdiction as the constitutional district courts, does not have jurisdiction with respect to territorial action on these matters.

One of these provisions is in Section 266 of the Judicial Code (28 U.S.C. 380, revised in new Judicial Code and Judiciary, 28 U.S.C. 2283) which provides that a district court shall not enjoin the enforcement of any statute of a state on the ground of unconstitutionality unless the matter shall be heard and determined by a three-judge court. The problem of whether Section 266 applies with respect to a territorial statute as well as with respect to a state statute depends on whether the term "State", as used in Section 266, does or does not include a territory. This problem is involved in the *Chinese Language School* case, *Mo Hock Ke Lok Po* vs. *Stainback,* 74 F. Supp. 852, 858-865, which is now before the Supreme Court.

Another of these provisions is in Section 24(14) of the Judicial Code (28 U.S.C. 41(14), revised in new Judicial Code and Judiciary, 28 U.S.C. 1343(3)), which gives to the district courts original jurisdiction over actions brought to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

B. Interference by a Constitutional District Court with Similar Proceedings in a State Court is Prohibited by Section 265 of the Judicial Code.

Section 265 of the Judicial Code (28 U.S.C. 379) provides as follows[2]:

The problem of whether Section 24(14) applies with respect to a law, statute, ordinance, regulation, custom or usage of a territory, as well as of a state, depends on whether the term "State", as used in Section 24(14), does or does not include a territory.

When the instant case was before the District Court counsel for the appellants (plaintiffs below) and the appellees (defendants below) agreed that the term "State", as used in Section 24(14), included a territory; and this agreement was accepted and approved by Judge McLaughlin (74 F. Supp. 865, 868). However, in the *Chinese Language School* case the three-judge court considered the problem *sua sponte* and came to the conclusion that the term "State", as used in Section 24(14), does not include a territory. In discussing the various paragraphs of Section 28 the court stated (74 F. Supp. 852, 853):

> "No one of these gives the district courts jurisdiction of a deprivation of a right created by a *territorial* law, though paragraph (14) gives such jurisdiction to such a deprivation by a state law. It thus seems that Congress intends that a territorial invasion of the right in controversy involving less than $3,000 should have its litigation in the territorial courts."

In the instant case, if Section 24(14) does not give jurisdiction then the district court had no jurisdiction because the complaint does not include any allegation of jurisdictional amount (Tr. pp. 5-22).

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[2]References are made to the Judicial Code prior to the enactment of the new Judicial Code and Judiciary effective September 1, 1948. Section 2283 of the new Judicial Code and Judiciary (28 U.S.C. 2283) is as follows:

> "A court of the United States may not grant an injunction to stay proceedings in State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

There are a few, but very few, statutory exceptions to the provisions of Section 265. There is also one, but only one, judge-made exception,—which latter permits a federal court to restrain state court proceedings seeking to interfere with property in custody of the federal court. The statutory exceptions existing in 1941 and the judge-made exception are listed in *Toucey* vs. *N. Y. Life Ins. Co.* (1941), 314 U. S. 118, 62 S. Ct. 139. *Bowles* vs. *Willingham* (1944), 321 U. S. 503, 64 S. Ct. 641, states that an additional statutory exception was created in 1942.

The exceptions mentioned in the *Toucey* case and in the *Bowles* case are the only exceptions. This appears from the following language in the *Bowles* case (321 U. S. 503, 510, 64 S. Ct. 641, 645):

> "We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942."

Furthermore, the opinion in the *Toucey* case indicates that the present judge-made exception may be justified on the basis that it was in existence prior to the original enactment in 1793 of the forerunner of Section 265, but that the existence of one judge-made exception is no justification for making another (314 U. S. 118, 139, 62 S. Ct. 139, 147). The creation of any additional judge-made exceptions would be in violation of the language and would tend to defeat the intent of Section 265.

For the purpose of the instant appeal the important point is that the Civil Rights Act (8 U.S.C. 43) is not an exception to Section 265. There is very good reason why the Civil Rights Act is not an exception. The Civil Rights Act protects all rights, privileges or immunities secured by the Constitution and laws of the United States. If the Civil Rights Act were an exception, the exception would necessarily be as broad as the rule and would in effect eliminate Section 265.

The cases below listed in this paragraph were federal court suits to stay state court proceedings on the ground that the state court proceedings were in violation of rights of the plaintiffs under federal laws. In other words, such cases involved civil rights under the laws of the United States. In each of such cases the court held that Section 265 precluded relief. The cases are: *Hemsley* vs. *Myers* (1891), 45 Fed. 283; *Ritholz* vs. *North Carolina State Board, Etc.* (1937), 18 F. Supp. 409, 412; *Davega-City Radio* vs. *Boland* (1938), 23 F. Supp. 969, 970; *Mickey* vs. *Kansas City, Mo.* (1942), 43 F. Supp. 739, 742; *Atlantic Fishermen's Union* vs. *Barnes* (1947), 71 F. Supp. 927, 928; and *Babcock* vs. *Noh* (1938), 99 F. 2d. 738, 740.

Section 265 applies only with respect to state court proceedings which have already been commenced. Under certain circumstances threatened prosecution in violation of constitutional rights or federal statutory rights may be enjoined. The distinction between a pending state court proceeding, and a threatened state court proceeding, was recognized by this court in *Babcock* vs. *Noh*, 99 F. 2d. 738, 739-740, *supra*. See also *Ex parte Young*, (1907), 209 U. S. 123, 161-163, 28 S. Ct. 441, 454-455.

In *Ritholz* vs. *North Carolina State Board, etc.*, 18 F. Supp. 409, 412, *supra*, it was pointed out, with citation of cases, that Section 265 forbids injunctions to stay proceedings in state courts not only as against the officers of such courts, but also as against parties to such proceedings. The injunctions which were disapproved

in the *Toucey* case were directed against parties in state court proceedings.

C. Interference by a Constitutional District Court with Similar Proceedings in a State Court would not be Justified, Even in the Absence of Section 265 of the Judicial Code.

Douglas vs. *Jeannette* (1942), 319 U. S. 157, 63 S. Ct. 877, arose out of a suit brought under the Civil Rights Act, in the United States District Court for Western Pennsylvania, to restrain threatened criminal prosecutions for violations of a city ordinance which was alleged to deprive the plaintiffs of rights of freedom of speech, press and religion under the United States Constitution[1]. Because the prosecutions were threatened, rather than pending, Section 265 of the Judicial Code did not apply.

The Supreme Court held that although the District Court had jurisdiction, in the sense that it had authority to hear and dispose of the case, there was a lack of equity jurisdiction in that the plaintiffs did not have a cause of action in equity. The Supreme Court therefore affirmed a judgment dismissing the suit. The basis of the lack of equity jurisdiction may best be indicated by quoting from the opinion, as follows (319 U. S. 157, 163-164, 63 S. Ct. 877, 881):

> "Congress by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceeding in state courts save in those exceptional cases which call for the interposition of

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[1]The ordinance was held to be unconstitutional in *Murdock* vs. *Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, decided the same day as *Douglas* vs. *Jeannette*.

a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. * * *

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * *

* * *

"It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."

In the instant appeal it does not appear that the appellants face any injury other than that incidental to every criminal proceeding brought lawfully and in good faith. Furthermore, the constitutionality of the Rice order may be determined as readily in the contempt proceedings pending against them (including appellate procedings with respect thereto) as in the instant case brought by them (including appellate proceedings with respect thereto).

D. The Judges of the Circuit Courts of the Territory are Best Qualified to Determine the Provisions to be Incorporated in Injunctions or Restraining Orders Regulating Picketing.

It is a doctrine of the *Drivers Union* case that an injunction or restraining order which regulates picketing

may be adjusted to the needs of the particular situation. In the *Drivers Union* case the Supreme Court approved a prohibition against all picketing, on the basis of findings of a master approved by the Illinois court. The Supreme Court stated that it would not re-examine the findings of the master or the testimony considered by him. On this point the opinion contains the following language (312 U. S. 287, 294, 61 S. Ct. 552, 555):

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked."

In *Nann* vs. *Raimist* (1931), 255 N. Y. 307, 174 N. E. 690, 693, the New York Court of Appeals indicated that the provisions of an injunction which regulates picketing should be left largely to the discretion of the chancellor, who has heard the witnesses, familiarized himself with the *locus in quo* and observed the tendencies to disturbance and conflict; and further that an appellate court should not interfere except for manifest abuse. *Nann* vs. *Raimist* was cited with approval in the *Drivers Union* opinion (312 U. S. 287, 298, 61 S. Ct. 552, 557).

In both the *Drivers Union* case and in *Nann* vs. *Raimist* the appellate courts approved injunctions which had prohibited all picketing. However, where it is recognized that the circumstances are not such as to justify the prohibition of all picketing, but merely to require the regulation of picketing in order to keep it within lawful bounds, then it can even more forcibly be said that the local judge is best qualified to determine just what regulations and restrictions are appropriate,—i.e., is best qualified to adjust an injunction or restraining order to a particular situation. As the court best qualified to make such adjustment, the local judge should be per-

mitted to determine where picketing should be allowed, the numbers of pickets which should be allowed, the spacing between pickets which should be required, and all other details relating to the regulation of picketing.

The proceedings in which the Rice order was issued, were brought in the Circuit Court of the Territory of Hawaii for the Fifth Circuit. The judge of said Circuit Court holds his hearings at the courthouse of said court, in the town of Lihue on the Island of Kauai. The plantation of The Lihue Plantation Company, Limited is also located on the Island of Kauai, adjoining the town of Lihue. Judge Rice was well qualified to adjust the Rice order to the particular situation presented to him.

On the other hand, although the District Court for the District of Hawaii has power to sit on the Island of Kauai, it does so very seldom. The proceedings in the instant case, before the District Court, were held in Honolulu on the Island of Oahu.

If the Supreme Court does not make an independent valuation of the data considered by a state court as the basis for an injunction or restraining order regulating picketing, certainly the District Court for the District of Hawaii should not make an independent valuation of the data considered by a territorial circuit court as the basis for a similar injunction or restraining order.

E. There is No Practical Reason Why the District Court for the District of Hawaii Should Supervise Labor Injunction Proceedings in the Territorial Courts.

Under Section 265 of the Judicial Code a district court is precluded from interfering with proceedings in a state court in which an injunction or restraining order regulating picketing has been issued or to interfere with contempt proceedings in a state court for violation of an injunction or restraining order regulating picketing.

As a practical matter there is no reason why the

rule should be different in the Territory of Hawaii. In this connection it may be noted that under Section 80 of the Hawaiian Organic Act (48 U.S.C. 633) the judges of the territorial circuit courts and also the judges of the supreme court are appointed, for four year terms, by the President of the United States with the advice and consent of the Senate.

We might mention at this time two points which were suggested by appellants, but which do not come within the pleadings in the instant case.

The appellants state that the complaint in the instant case contains allegations that the criminal proceedings against them were not brought in good faith (Op. Br. p. 13). We do not believe that this statement is correct. It is true that the complaint contains allegations that the actions taken by Judge Rice and by the Attorney General constitute a course of action in violation of the rights of plaintiff. Such allegations appear, for example, in paragraph V of the first count (Tr. pp. 6-7), and also in paragraph V of the fourth count (Tr. pp. 15-16). The purport of such allegations, however, is simply that in the opinion of the appellants and their attorneys Judge Rice was in error and without jurisdiction in issuing a restraining order and that the Attorney General is in error in bringing contempt proceedings for violation of the Rice order.

The appellants also claim that they were entitled to show that Judge Rice was disqualified by law under Section 84 of the Organic Act (48 U.S.C. 636) because he is related within the third degree of consanguinity and affinity to stockholders of The Lihue Plantation Company, Limited (Op. Br. p. 21). This claim was not raised by the complaint in the instant case. Furthermore, in accordance with the general rule, the relationship of a judge to a stockholder of an interested corporation is held not to be a disqual-

ification under Section 84. See 30 Am. Jur., Judges, Section 72, 8 A.L.R. 295, 110 A.L.R. 472, *Ewa Plant. Co.* vs. *Tax Assessor* (1907), 18 H. 509, and *Bruner* vs. *Brewer* (1911), 20 H. 617. Furthermore, if the Rice order was void because of the disqualification of Judge Rice this matter could be raised in the usual manner, without resort to the District Court.

In addition, even if it be assumed that Judge Rice was disqualified and that his disqualification raised a federal question, nevertheless the district court did not have jurisdiction with respect thereto in the instant case. The complaint in the instant case does not include any allegation of jurisdictional amount. The complaint is brought under Section 24 (14) of the Judicial Code (28 U.S.C. 41(14)). Section 84 of the Hawaiian Organic Act does not provide for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States: it is local in its effect to the Territory of Hawaii and therefore does not come within the scope of Section 24(14) of the Judicial Code.

PART VI

CONCLUSION: THE COMPLAINT IN THE INSTANT CASE WAS PROPERLY DISMISSED

The complaint in the instant case contains four counts.

The first count alleges that Judge Rice did not have jurisdiction to issue the Rice order without complying with the provisions of the Norris-LaGuardia Act, because the Circuit Court of the Territory of Hawaii for the Fifth Judicial Circuit is a "court of the United States" (Tr. pp. 5-12). The second count alleges, in the alternative, that the Norris-LaGuardia Act conferred exclusive jurisdiction to issue injunctions and restraining orders in Hawaii

in labor dispute cases on the United States District Court for the District of Hawaii (Tr. pp. 12-13). These two issues relate to the jurisdiction of said Circuit Court. These two issues are not only involved in the *Wirtz* appeal but decision thereon is necessary to a determination of the *Wirtz* appeal. It is our position, not however supported by argument in this brief, that Judge Rice did have jurisdiction to issue the Rice order and that both the first count and the second count fail to state a claim for relief.

The third count alleges that the Rice order was in violation of substantive rights of the appellants under the Clayton Act and the Norris-LaGuardia Act (Tr. pp. 13-14). For the reasons shown in Part IV of this brief the third count fails to state a claim for relief.

The fourth count alleges that the Rice order was in violation of constitutional rights (Tr. pp. 14-20). For the reasons shown in Part III of this brief the fourth count fails to state a claim for relief.

Furthermore, because of the matters set forth in Part V of this brief, relating to the relationships between the United States District Court for the District of Hawaii and the territorial courts, the complaint fails to state a claim for relief.

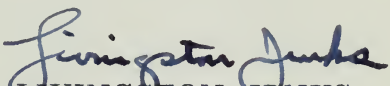
The answer in the instant case states various defenses of law, in paragraph XXV et seq., which embrace all of the contentions above set forth to the effect that the complaint failed to state a claim for relief (Tr. pp. 78-80). Pursuant to rule 12(d) of the Rules of Civil Procedure the appellees (defendants below) filed a motion for hearing and determination before trial of the defenses of law and for a dismissal of the suit (Tr. pp. 306-309). The motion was granted and the action was dismissed (Tr. pp. 343-344).

The procedure was complicated by two additional motions. In the first place, the appellants (plaintiffs below) filed a motion to strike certain allegations of the answer and exhibits attached to the answer (Tr. pp. 309-310). In the second place, the appellees (defendants below) filed a motion requesting that the district judge take into consideration the whole record in considering the motion to dismiss (Tr. p. 312).

The appellants complain of the treatment of these latter motions (Op. Br. pp. 12-13). If, however, the complaint and each count thereof fails to state a claim for relief, the treatment of these latter motions is of no significance and the dismissal of the action must be affirmed.

It appears from the opinion of Judge McLaughlin that although he felt that he could consider the allegations in the answer and the exhibits if necessary (74 F. Supp. 865, 869), he nevertheless decided as a matter of law that the complaint did not state any claim for relief (74 F. Supp. 865, 869 as to first and second counts, 869-870 as to third count, and 876 as to fourth count).

Respectfully submitted,



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